No. 96-609

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1997

TONAWANDA BAND OF SENECA INDIANS; BERNARD PARKER, a/k/a Ganogehdaho; KERVIN JONATHAN, a/k/a Skongataigo; EMERSON WEBSTER, a/k/a Gauhnahgoi; DARREN JIMERSON, a/k/a Sohjeahnohous; HARLEY GORDON, a/k/a Gah-En-Keh; JAMES LOGAN; and DARWIN HILL,

Petitioners,

vs.

PETER L. POODRY, DAVID C. PETERS, SUSAN LAFROMBOISE, JOHN A. REDEYE, STONEHORSE LONE GOEMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do permanent banishment orders imposed upon five members of the Tonawanda Band of Seneca Indians as punishment following summary convictions for the crime of treason by the Tonawanda Band Council of Chiefs, followed by forcible attempts to remove such members from their homes on the Tonawanda reservation, constitute sufficiently severe restraints on liberty to invoke federal court jurisdiction pursuant to the habeas corpus provisions of the Indian Civil Right Act of 1968?

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SUMMARY

Respondents are members of the Tonawanda Band of Seneca Indians, a federally recognized Indian tribe, who were summarily convicted of treason and sentenced to permanent banishment from their reservation. The district court (Honorable Richard J. Arcara, District Judge, Western District of New York) dismissed respondents' five separate applications for habeas corpus relief pursuant to the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §1301-1303. The Court of Appeals vacated the dismissals and remanded the matters to the district court for hearings on the merits. Respondents respectfully urge the Court to deny the petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit, entered on May 16, 1996, and the subsequent denial of a petition for rehearing, entered on July 19, 1996. The thoughtful and learned majority opinion of the Court of Appeals (Honorable Jose A. Cabranes, Circuit Judge) is plainly correct and does not merit review.

The Court of Appeals correctly determined that the district court erred in dismissing the applications for writs of habeas corpus, the sole remedy available to respondents pursuant to the ICRA. The Second Circuit thoroughly examined the history of the ICRA, the distinction between judicial review of criminal and civil matters under the ICRA, the scope of the ICRA habeas corpus relief in relation to traditional habeas corpus review of applications brought by persons in state or federal custody, and this Court's precedents establishing that actual physical custody is not a jurisdictional prerequisite for federal habeas review. The Court of Appeals properly concluded that permanent banishment

as a punishment for treason was a sufficient restraint on liberty to invoke federal jurisdiction via a petition for writ of habeas corpus under 25 U.S.C. §1303.

Petitioners herein erroneously contend that the Court of Appeals expanded federal habeas corpus jurisdiction. On the contrary, the Court of Appeals took great pains to respect tribal sovereignty in the light of Congress' express intent to restrict abuses of tribal power. In the ICRA, Congress carefully balanced tribal interests and individual liberty interests. Pursuant to Congress' direction and consistent with this Court's Holding in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), the Court of Appeals properly determined that jurisdiction was appropriate to invoke the limited remedy of habeas corpus review provided by Congress under the ICRA.

The writ should be denied, not only because the Court of Appeals came to the proper conclusion, but also because the matter has been remanded to the District Court for proceedings on the merits.

PARTIES, OPINIONS BELOW, JURISDICTION AND APPLICABLE STATUTES

The petitioner's statements regarding the parties to the proceeding, the opinions below, the jurisdiction of the Court and the statutory provisions involved are incorporated by reference herein. The Court of Appeals' decision is reported at 85 F.3d 874 (2d Cir. 1996).

STATEMENT OF THE CASE

This case concerns five Tonawanda Seneca Indians who, without a trial, prior notice, or any other form of due process of law, were pronounced guilty of treason by certain tribal officials. The respondents were stripped of their Indian citizenship and rights and sentenced to permanent banishment from the tribe and its Indian reservation.

Respondents Poodry, Redeye, LaFromboise, Peters and Goeman are members of the Tonawanda Band of Seneca Indians, a federally recognized Indian tribe. They reside with their families and, in some cases, maintain businesses at the Tonawanda Seneca Indian Reservation near Akron, New York.

Petitioners are the Tonawanda Band of Seneca Indians and certain tribal officials. Petitioners Parker (recently deceased), Jonathan, Webster, Jimerson, Gordon, and Logan are members of the Council of Chiefs of that tribe, and respondent Hill is the tribal clerk.

To avoid duplication, respondents incorporate by reference the statement of the facts and procedural history summarized in the majority opinion of the Court of Appeals and set out at pages A3-A10 of the appendix to the petition for writ of certiorari.

Consistent with this Court's admonition to advise the Court of any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted (See Rule 15.2 of the Rules of the Supreme Court), respondents believe the petitioners have (at page 3 of the petition) misstated facts relevant to the Court's determination herein by stating that attempts to secure compliance with the

banishment orders at issue have been limited to social pressure and to the denial of services. As noted at pages A7-A9 of the appendix to the petition, the Court of Appeals observed that the individuals bearing the notices of conviction of treason and punishment of banishment attempted to take the respondents into custody and eject them from the Tonawanda Reservation. After this initial attempt to remove respondents from the reservation, members of the tribal council and persons purporting to act on their behalf continued to harass and assault the respondents and their family members, including an attack on respondent Susan LaFromboise on Main Street in Akron, New York and a stoning attack on respondent David Peters. The respondents remain subject to the summary and forcible execution of the standing banishment orders at any time.

REASONS FOR DENYING THE WRIT

A. The Narrow Issue Of ICRA Habeas Corpus Jurisdiction Was Correctly Decided By The Court Of Appeals And The Parties Should Return To The District Court For Hearings On The Merits.

In deciding only that the district court had jurisdiction to consider the respondents' habeas corpus application under the ICRA, the Court of Appeals carefully balanced tribal sovereignty interests and the interests of individual Indians protected by the ICRA. The Court of Appeals determined that the imposition of criminal sanctions was not itself sufficient to permit a district court to entertain an application for writ of habeas corpus under the ICRA, without also demonstrating, under *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) and its progeny, a severe, actual or potential restraint on liberty (Petition A11). The Court of Appeals properly rejected the characterization of the actions of the members of the tribal council as merely a tribal membership dispute, or necessarily civil in nature. In the light of the undisputedly strong and direct language in the orders of permanent banishment, the Court of Appeals correctly concluded that the convictions of treason and declarations of banishment constitute punitive sanctions imposed for allegedly criminal behavior, rather than simply a membership dispute. The Court of Appeals also specifically rejected the argument by the respondents herein that the habeas corpus provision of the ICRA, 25 U.S.C. §1303, was intended to have broader reach than similar statutory provisions governing collateral review of state and federal action. Accordingly, the petitioners' primary basis for invoking this Court's extraordinary and discretionary jurisdiction, *i.e.* that federal habeas corpus jurisdiction has been expanded generally by the Second Circuit Court of Appeals, is simply incorrect.

B. The Court Of Appeals Correctly Concluded That Permanent Banishment As Punishment For Treason Is A Sufficient Restraint On Liberty To Invoke Habeas Corpus Jurisdiction, Consistent With Congress' Intent In Limiting Tribal Sovereignty Pursuant To The ICRA And Consistent With This Court's Decision In *Santa Clara Pueblo v. Martinez,* Which Recognized A Writ Of Habeas Corpus As The Sole Federal Remedy Available For Violations Of The ICRA.

The Court of Appeals properly rejected petitioner's attempts to manufacture a conflict with this Court's ruling in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). The Court of Appeals properly determined that the ICRA's explicitly created habeas corpus remedy applied under the unique circumstances of this case. A summary criminal conviction of treason announced by the tribe and the resulting punishment of banishment, without any recourse in a tribal court or other tribal forum, is far different than the dispute over general requirements for tribal membership at issue in *Santa Clara Pueblo v. Martinez.* The Court of Appeals appropriately noted that banishment has historically been punitive in nature, citing *Kennedy v. Doza-Martinez,* 372 U.S. 144, 168 n.23 (1963); *Klapprott v. United States,* 335 U.S. 601, 611-612 (1949); and *Trop v. Dulles,* 356 U.S. 86, 104, 114 (1958).

The court below properly concluded that the banished tribal members "surely identified severe restraints on their liberty" (Petition A46). Judge Cabranes found that the district court erred in ignoring several material factual allegations in light of the following uncontested relevant jurisdictional facts: that the banishment notices were served on three of the respondents by groups of 15 or 25 people demanding the

respondents' removal; that there have since been other attempts to remove the respondents from their reservations; that certain respondents have been threatened or assaulted by individuals purporting to act on the tribal council's behalf; and that the respondents have been denied electrical service (Petition A46). The Court of Appeals also determined that the District Court had misapplied the law by suggesting that ongoing supervision by the Tonawanda Band Council of Chiefs was required to establish sufficient restraints on liberty to invoke habeas corpus jurisdiction. Given the unpredictability of the pending banishment orders hanging over the tribal members, the Court of Appeals found such punishment particularly pernicious and determined that the existence of the orders of permanent banishment alone, even absent attempts to enforce them, would be sufficient to satisfy the jurisdictional prerequisites of habeas corpus. The violent attempts to remove and harass respondents, which continued prior to their applications for court intervention, further illustrate the severity of the punishment and underscore the propriety of federal habeas corpus jurisdiction.

Petitioners illogically chastise the Court of Appeals for inquiring into the severity of the punishment declared by the tribal officials. How else was the court going to determine whether sufficient restraints on liberty had been imposed to justify a writ of habeas corpus? *See e.g., Hensley v. Municipal Court,* 411 U.S. 345 (1973). The Court of Appeals logically concluded that the severity of the sanction was evident from the orders of banishment themselves which suggest that banishment is imposed without notice only for the most severe of crimes; murder, rape and treason. Judge Cabranes reasoned that had the tribal members been charged with lesser offenses and been subjected to the

lesser punishment of imprisonment, there is no question that a federal court would have the power to inquire into the legality of the tribe's action, pursuant to the ICRA. Accordingly, the Court of Appeals correctly concluded that Congress could not have intended to permit a tribe to circumvent the ICRA's habeas provisions by permanently banishing, rather than imprisoning, members convicted of the offense of treason.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED: Buffalo, New York
November 15, 1996

Respectfully submitted,

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